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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-158

BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE and EDWARD J. BOLING,
Petitioners,

v.

DR. RAJ P. SONI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DR. RAJ P. SONI IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FILED BY THE BOARD OF TRUSTEES OF THE UNIVERSITY OF TENNESSEE AND EDWARD J. BOLING

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OPINIONS OF COURTS BELOW

The Memorandum Opinion of the Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, Northern Division, dated February 21, 1974, is reported at 376 F. Supp. 289 and is reproduced in the Appendix attached to the Petition of the

Board of Trustees of The University of Tennessee and Edward J. Boling (hereinafter referred to as The University of Tennessee) (A. 20).

The Opinion of the Honorable Henry J. Phillips, Chief Judge, United States Court of Appeals for the Sixth Circuit, dated March 12, 1975, is reported at 513 F.2d 347 and is reproduced in the Appendix attached to the Petition of The University of Tennessee (A. 27).

The Order of the United States Court of Appeals for the Sixth Circuit, dated June 5, 1975, amending the Opinion of the Court announced March 12, 1975, is reproduced in the Appendix attached to the Petition of The University of Tennessee (A. 42).

The Order of the United States Court of Appeals for the Sixth Circuit, dated June 5, 1975, denying the Petition to Rehear filed by Petitioners is reproduced in the Appendix attached to the Petition of The University of Tennessee (A. 43).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 12, 1975. A Petition for Rehearing filed on March 25, 1975, was denied by the Court of Appeals on June 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated §49-1303 provides as follows:

49-1303. Aliens as teachers -- Advocating overthrow of government. -- It shall be unlawful for the trustees of the University of Tennessee, the state board of education, or any county or city board of education, or any other person to employ any superintendent, principal, teacher, tutor, supervisor, or other person to have in any way the custody and care of students of the public educational institutions of this state who is not a citizen of the United States of America; provided that nothing in this section shall be construed to prohibit arrangements whereby professors and teachers who are citizens of other nations may be employed on a temporary basis on the faculties of colleges, universities or public schools in Tennessee; provided, further, that no person who advocates the overthrow of the American form of government or who is a member of a political party subscribing to a political faith which advocates the overthrow of the American form of government shall be employed on either a temporary or permanent basis in any school in this state financed in whole or in part with public funds. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100), and shall forfeit his office.

Apparently, pursuant to said statute, The University of Tennessee promulgated the following rule set forth in its Faculty Handbook in Chapter III, at page 15 (A. 5a):

> Citizenship. Citizens (by birth or naturalization) may be employed in positions considered to be permanent. Citizens of other countries may be employed in temporary positions only.

The University of Tennessee was incorporated by the General Assembly of Tennessee by Chapter 64 of the Acts of 1807. The original charter provides as follows:

> The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this state or elsewhere. Scotts Revision, Volume 1, 1047 (1820).

Tennessee Code Annotated §20-1702 provides:

> No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

QUESTIONS PRESENTED

1. Did the provisions of *Tennessee Code Annotated* §49-1303 prevent Respondent, while a non-citizen of the United States, from obtaining a property interest in future and continued or permanent employment from The University of Tennessee?

2. Did the existence of a formal tenure system at The University of Tennessee preclude Respondent from obtaining de facto tenure from The University of Tennessee in a manner contrary to or inconsistent with the provisions and requirements of the formal tenure system?

3. If Respondent was not precluded from obtaining de facto tenure from The University of Tennessee in a manner contrary to and inconsistent with the provisions and requirements of the University's formal tenure system, did Respondent in fact obtain such de facto tenure?

4. Does the provision of the Charter of The University of Tennessee that the University may "sue and be sued" constitute a waiver of the University's Eleventh Amendment immunity, as a state agency, such that the property of the University is subject to divestiture through exercise of judicial power?

STATEMENT OF THE CASE

The United States Court of Appeals for the Sixth Circuit affirmed the District Court's finding of the following facts:

Respondent was born in India on June 2, 1933. He is married and has two children, ages 15 and 10. Dr. Soni graduated from Panjab University in India in 1951 with a Bachelor of Arts degree with honors in mathematics. In 1953 he received his Master of Arts degree in mathematics from the same University and began teaching as a lecturer in mathematics on the college level at D.A.V. College, Hoshiarpur. After one year at D.A.V. College, Hoshiarpur, Dr. Soni accepted a position as lecturer in mathematics in the Panjab Education Service at Government College, Muktsar. From 1954 to July, 1959, Dr. Soni taught on the college level as a lecturer in mathematics in the Panjab Education Service.

In July, 1959, Dr. Soni went to the United States to obtain his Ph.D. in mathematics from Oregon State University, which he received in June, 1963. Upon the receipt of his Ph.D., Dr. Soni accepted the position of senior associate mathematician with the IBM Corporation in Endicott, New York.

Due to the quota restrictions of the immigration laws of 1952, Dr. Soni had to wait three years before being admitted to the United States as an immigrant in April, 1966. Later that same year Dr. Soni took a leave of absence from the IBM Corporation to become a Visiting Associate Professor at Oregon State University, Corvalis, for the academic year 1966-1967. He rejoined the IBM Corporation in June, 1967.

In July, 1967, Respondent accepted a position with The University of Tennessee. By the time he resigned from the IBM Corporation in September, 1967, to join the Mathematics Department of The University of Tennessee as a Visiting Associate Professor, Dr. Soni's full-time teaching experience on the college level included six years as an instructor in India and one year as an Associate Professor at Oregon State University.

At the time Respondent accepted employment at The University of Tennessee as a Visiting Associate Professor, the University was in need of mathematics professors as were other universities. More mathematics positions were available than there were mathematic professors to fill them. In response to its own increase in demand, The University of Tennessee hired approximately twelve (12) math teachers for the school year 1967-1968 and the following year hired six more math teachers for the academic year 1968-1969. Mathematics professors were in demand, and, consequently, employment opportunities

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were plentiful. By 1972 this employment picture had completely reversed itself. Math positions had become scarce and math professors numerous.

During the 1967-1968 school year, Respondent discussed the question of his being granted a permanent position at the University on several occasions with the then Head of the Department of Mathematics, Professor John H. Barrett. At this time Respondent was concerned about the permanency of his job status with the University and was interested in having a decision made one way or the other. If he and his wife were not going to be retained at the University on a permanent basis, they intended to look for a position and go elsewhere. If they were going to be retained on a permanent basis, they intended to settle down, buy a home, and stay at the University.

As a result of these discussions, it was mutually agreed between Respondent and Professor Barrett that his visiting appointment would be extended for the school year September, 1968 - June, 1969, but that a decision about a permanent appointment with tenure would be made in the fall of 1968.

On October 3, 1968, the Head of the Department of Mathematics, Professor John H. Barrett, issued "A recommendation for consideration by Professors and Associate Professors (with tenure)" regarding Respondent and his wife, Kusum Soni:

> I recommend that Professor Raj Soni be offered an Associate Professorship *with tenure* . . .
>
> . . .
>
> Shortly after he arrived, he and I agreed that a two-year visiting position would be appropriate and that during this time we would consider him for a *permanent position* . . . .

> Since it is not possible for two people in the same family to have tenure in the same department, there is no question of tenure for Mrs. Soni. However, I recommend that we express our intent to keep her on the staff permanently . . . . (Emphasis added)

Pursuant to the recommendation of the Head of the Department, Dr. Donald J. Dessart, who was appointed Acting Head of the Department of Mathematics when Professor Barrett became ill, issued a memorandum to the appropriate faculty members stating that "There will be a meeting at 11:00 A.M. in my office (A124A) on Tuesday, October 29, 1968, to consider approving Professor Soni for a *permanent* appointment." (Emphasis added)

The meeting called by Dr. Dessart was a special meeting. The sole person to be discussed was Dr. Soni. The sole issue to be considered was his permanent appointment. Normally, promotions and tenure were considered by the tenured faculty of the Mathematics Department at an annual meeting held around the first of the year.

Prior to the October 29 meeting, Dr. Dessart wrote out several lists pertaining to the meeting. On a copy of the notice he had sent out, he listed four agenda items as follows:

(1) Read "John's" letter.
(2) Discuss page 15 of Faculty Handbook.
(3) Professor Soni desires some positive assurance, as he would either like to buy a home, look for a new job, make plans early.
(4) If he were eligible for permanent appointment at this time, this group would recommend that he be given tenure. To demonstrate our good faith we recommend that he be approved for TIAA/CREF retroactive to September, 1968 if that can be arranged.

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On another piece of paper he listed four options he thought the faculty had in considering Dr. Soni's status:

1. terminate visiting appointment without an offer for renewal.
2. offer another one-year appointment.
3. offer one-year appointments with an informal understanding of automatic renewal until he becomes a citizen.
4. offer one-year appointment with an informal understanding of automatic renewal with the recommendation to a future body that he be granted tenure.

On still another list Dr. Dessart listed the following five agenda items:

1. Quote from John's letter.
2. Discuss U. S. citizenship question.
3. However, he does want some assurance.
4. Discuss options and discussions with John Baugh - Legal Counsel.
5. Other assurance - verbal from colleagues
   - TIAA/CREF

On October 29, 1968, the meeting of the tenured faculty called by Professor Dessart was held in his office. During the meeting Professor Dessart summarized the contents of the memorandum from the Head of the Mathematics Department, Dr. Barrett, recommending that Dr. Soni be offered an Associate Professorship with tenure. A general discussion of Dr. Soni followed. During the discussion, Dr. Dessart pointed out that Dr. Soni was not a citizen of the United States and, consequently, could not be

appointed formally to a permanent position at the University in light of a requirement of state law, and a University regulation, that, while aliens could be appointed to temporary positions at the University, they could not receive permanent appointments. Nevertheless, Dr. Dessart pointed out that Dr. Soni wanted some decision from the faculty on the permanency of his job status. It was made clear that Dr. Soni wanted some assurances from the Department and that he was concerned about his future at the University in regard to whether he should purchase a home in the University community.

Solely because of the state law, the University regulation, and Dr. Soni's lack of citizenship, no formal vote was taken at the meeting on appointing Dr. Soni to a permanent faculty position with the University. Instead, Dr. Soni was changed from a Visiting Associate Professor to an Associate Professor for the school year 1969-1970, but there was a general understanding that Dr. Soni would be thought of as filling a permanent position in the Mathematics Department, though such a position could not be officially formalized.

After the special meeting, Dr. Soni was congratulated by those faculty members who had attended the meeting and was assured by his colleagues that the action of the tenured faculty had been favorable.

Following the October 29 meeting, Dr. Soni received a letter from Dr. Dessart stating "it was recommended that you be appointed an associate professor without tenure . . . The question of recommending tenure will be considered by a similar departmental group at the time you become a citizen of the United States. In addition, it was recommended that you receive the full benefits of participation in TIAA/CREF at the first reasonable opportunity . . ."

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The TIAA/CREF is a financial retirement program at the University that, at that time, was restricted to "permanent type personnel."

Since Dr. Dessart's letter of October 29 was not in accord with the spirit of the earlier congratulations, Dr. Soni immediately sought out Dr. Dessart to obtain an explanation. When he met with Dr. Dessart, Dr. Soni was assured by him that the meeting had indeed been favorable but that his official grant of tenure could not be formally announced until he became an American citizen because of the requirement of State law and the University regulation. Dr. Dessart, however, assured Dr. Soni that he would be treated as a tenured professor in all respects and afforded all the rights and privileges of tenure.

Dr. Dessart testified, as did the only other two witnesses, that had a vote been taken at the October 29 meeting, he would have voted for granting Dr. Soni tenure. In fact, Dr. Dessart stated that he wanted Dr. Soni to stay at the University and thought very favorably of him.

On October 30, 1968, Dr. Dessart also wrote a letter to Mrs. Kusum Soni that was identical to the letter he had sent Dr. Soni except that the recommendation was for "an assistant professor without tenure" and the reference to TIAA/CREF benefits was omitted.

Thereafter, in all other operative respects Dr. Soni was treated by his fellow faculty members as a tenured professor—a person with some permanency in the Department's future. In particular, Dr. Soni was invited and attended the annual meetings of the tenured faculty, where he was afforded the opportunity to participate in the discussions, make observations, and vote on the promotion and tenure status of other members of the faculty of the Department of Mathematics. In addition, he partici-

pated in the retirement program (TIAA/CREF) at the University as a permanent employee.

Satisfied with his conversation with Dr. Dessart and the assurances of his fellow faculty members, together with other evidence of his permanency in the University community, Dr. Soni and his wife purchased a home in the Knoxville area and ceased looking for employment at other universities. Dr. Soni had no reason to be alarmed by the lack of official notice of his tenure because of the assurances he received and because there were other permanent members of the Mathematics Department faculty who considered themselves tenured on being promoted to the rank of Associate Professor, but who were not officially notified of their tenure until quite some time thereafter. If Dr. Soni had not been assured of the permanency of his position at the University, he would not have purchased a home in Knoxville and would have immediately sought employment elsewhere at a time when associate professors in mathematics were in demand.

Subsequently, Dr. Soni continued to teach in the Department of Mathematics for the school years 1969-1970, 1970-1971, and 1971-1972. During this time Respondent was given no reasor to believe that he was not a permanent member of the faculty. On December 15, 1971, he became a citizen of the United States. On March 8, 1972, he was summarily notified by letter that his appointment as an Associate Professor would be terminated as of August 31, 1973. Dr. Soni was not afforded a hearing by any departmental or administrative committee, but was only advised in the termination letter that his performance as a teacher was not "of the quality we expect of our tenured staff". Dr. Soni sought recourse through the appropriate administrative procedures, but the decision to terminate him was made final by the Board of Trustees on June 21, 1973.

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On August 29, 1973, Respondent filed his Complaint in the United States District Court for the Eastern District of Tennessee, Northern Division, against Petitioners alleging that The University of Tennessee, through its agents, acted unlawfully and contrary to the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the Constitution of the United States by:

(a) discriminatorily classifying the plaintiff according to his alienage;

(b) terminating the plaintiff's employment with the University in a manner different from the procedures applicable to tenured faculty members;

(c) treating the plaintiff differently from other similarly situated faculty members with at least seven years of service as full-time instructors on the college level; and

(d) depriving the plaintiff of his property right of an expectancy of continued employment at the University without due process of law.

Respondent sought a judgment declaring that Petitioners had violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment as set out above and for a preliminary and permanent injunction restraining Petitioners from terminating Respondent's employment with the University as of August 31, 1973, or directing the reinstatement of Respondent as of August 31, 1973, in the event that Respondent had been terminated at the time of the hearing of this cause.

On February 21, 1974, the Honorable Robert L. Taylor, Judge, United States District Court for the Eastern District of Tennessee, Northern Division, issued a Memorandum Opinion and Order in which he concluded that in light of

the factual background presented to the Court there vested in Respondent a cognizable property interest in the form of a reasonable expectation of future and continued employment that could not be terminated without procedural due process; that Respondent's termination by the University was without minimal due process and, therefore, wrongful; and that Respondent was thus entitled to back pay from August 31, 1973, until the University completed a hearing complying with the requirements set forth in said Memorandum Opinion and Order.

On March 12, 1975, the United States Court of Appeals for the Sixth Circuit affirmed the judgment and findings of the District Court.

On June 5, 1975, the Court of Appeals denied the Petition to Rehear filed by Petitioners.

ARGUMENT

QUESTION 1

DID THE PROVISIONS OF TENNESSEE CODE ANNOTATED §49-1303 PREVENT RESPONDENT, WHILE A NON-CITIZEN OF THE UNITED STATES, FROM OBTAINING A PROPERTY INTEREST IN FUTURE AND CONTINUED OR PERMANENT EMPLOYMENT FROM THE UNIVERSITY OF TENNESSEE?

Tennessee Code Annotated §49-1303 did not prevent Respondent from obtaining a property interest and/or a reasonable expectation of future and continued or permanent employment from The University of Tennessee.

Unconstitutionality of State Statute

Any consideration of *Tennessee Code Annotated* §49-1303, and the University regulation adopted pursuant thereto, is

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tainted by the fact that the law prohibiting permanent employment of aliens is blatantly unconstitutional on its face as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *Mohamed v. Parks*, 352 F. Supp. 418 (D. Mass. 1973); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971).

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens but protects resident aliens as well. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Equal Protection Clause is also applicable to the employment conditions of teachers in public colleges. *Rainey v. Jackson State College*, 435 F.2d 1031 (5th Cir. 1970); *Trister v. University of Mississippi*, 420 F.2d 499 (5th Cir. 1969).

Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971). Such classifications carry no presumption of validity and must be narrowly tailored to fit a substantial and compelling state interest. *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

The arbitrariness and discriminatory nature of *Tennessee Code Annotated* §49-1303 is manifested in the very words of the statute. Aliens are excluded from permanent employment but are permitted employment on a temporary basis. If an alien is so qualified as to be trusted with the care and supervision and teaching of students on a temporary basis, should not the same alien be qualified to be entrusted with the same responsibilities on a permanent basis?

At the time Respondent was considered for a permanent appointment in 1968, he was subjected to a separate category of treatment by virtue of *Tennessee Code Annotated* §49-1303 solely on the basis of his status as an alien. Respondent's lack of citizenship was the only reason no vote was taken at the October 1968 meeting to officially grant him tenure at the University. Respondent was deprived of the guarantees of the Equal Protection Clause of the Fourteenth Amendment for the sole reason that he was an alien, and the denial of an official grant of tenure at that time imposed upon him a burden inconsistent with his right to the equal protection of the laws.

It is thus the position of Respondent that *Tennessee Code Annotated* §49-1303 is unconstitutional and that an unconstitutional statute did not, and should not, prevent Respondent from obtaining a property interest in future and continued employment from The University of Tennessee. In fact, it is solely because of this unconstitutional statute that this entire problem arose. If there had been no such statute in existence in 1968 and aliens had been treated similar to citizens by The University of Tennessee, Respondent would have been granted official tenure, and the entire question of whether he obtained a property interest in future and continued employment would never have arisen.

Validity of Tennessee Supreme Court Decision

Petitioners cite the case of *State ex rel. Angle v. City of Knoxville*, 176 S.W.2d 801 (1944), for the proposition that the Tennessee Supreme Court has held that non-citizens have no rights as teachers. Petitioners argue that this 1944 decision, coupled with §49-1303, presents a conflict with the Opinions of the District Court and the United States Court of Appeals for the Sixth Circuit that warrants resolution by this Court.

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Respondent contends that this Court has already resolved any such alleged conflict in favor of the District Court and Court of Appeals by its decisions in *Sugarman* and *In re Griffiths*. The Court of Appeals recognized that these two cases by implication rendered the Tennessee statute void and unconstitutional. (A. 31-32, n. 1). By the same token, these two cases also overrule by implication any Tennessee Supreme Court decision to the contrary.

The only reason the District Court and the Court of Appeals did not specifically rule §49-1303 unconstitutional was because they recognized that this issue was not directly before the Court. The only issue to be decided was whether Respondent had obtained a property interest in future and continued employment from The University of Tennessee. A statute that is unconstitutional on its face (and a state court decision pursuant to that statute) does not stand in the way of making such a determination and did not preclude Respondent from obtaining such an interest.

In addition, the Office of the Attorney General of the State of Tennessee has recognized that §49-1303 is unconstitutional and that any court decision affirming said statute would likewise be outdated and overruled.

> It is the opinion of this office that, insofar as it relates to employees in public education, TCA §49-1303 is unconstitutional. (Appendix A, *infra*)

More recently, Petitioners themselves have recognized the unconstitutionality of *Tennessee Code Annotated* §49-1303 and the appropriateness of treating all persons equally in awarding tenure. On June 19, 1975, the Knoxville News-Sentinel reported that The University of Tennessee had granted tenure to nine aliens (Appendix B, *infra*). This action nullifies Petitioners' argument that there is a conflict that should be resolved by this Court as to whether

Tennessee Code Annotated §49-1303 prevents a non-citizen from obtaining a property interest and/or a reasonable expectation of future and continued or permanent employment from The University of Tennessee.

Petitioners also now contend that a resolution of this alleged conflict is of critical importance to the University. This argument overlooks the fact that the decisions of the District Court and Court of Appeals are based on the guidelines set forth in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), that Respondent had obtained a property interest. Petitioners' fear that every alien excluded by §49-1303 will now claim such a property interest is thus unwarranted. If any such claims are made, their success or failure will depend on whether that particular case and fact situation meets the guidelines, standards and requirements set forth in the *Roth* and *Perry* cases.

QUESTION 2

DID THE EXISTENCE OF A FORMAL TENURE SYSTEM AT THE UNIVERSITY OF TENNESSEE PRECLUDE RESPONDENT FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY AND INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THE FORMAL TENURE SYSTEM?

The existence of a formal tenure system at The University of Tennessee did not preclude Respondent from obtaining de facto tenure.

This Court in *Perry v. Sinderman*, *supra*, stated that:

> A teacher, like the respondent, who has held his position for a number of years, might be able to show from the circumstances of this service—and from other rele-

> vant facts—that he has a legitimate claim of entitlement to job tenure. Just as this court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement (citation), so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure. This is particularly likely in a college or university . . . that has no explicit tenure system . . . but that nonetheless may have created such a system in practice. 408 U.S. at 602.

The Court of Appeals for the Sixth Circuit clearly held that the existence of a formal tenure system at The University of Tennessee did not preclude Respondent from obtaining de facto tenure.

> The Court did not say, as it easily could have, that a reasonable expectancy cannot arise in the context of a formal tenure system. The existence of such a system is but one factor for the trial court to consider in analyzing the due process claim of a formally non-tenured professor. (A. 33)

Petitioners argue that the decision of the Court of Appeals for the Eighth Circuit in *Cusumano v. Ratchford*, 507 F.2d 980 (8th Cir. 1974), is in direct conflict with the holding of the Court of Appeals for the Sixth Circuit. Petitioners base their argument on the assertion that the facts in *Cusumano* are identical to those in this case, the results in the two cases are different, and therefore there is a conflict between the two Circuits that requires a resolution by this Court.

Respondent respectfully urges that the facts of these two cases are hardly identical, that there is no conflict between the two Circuits, and that this Court has already

made it clear in its *Perry* opinion that the existence of a formal tenure system does not preclude the obtaining of de facto tenure.

It is apparent from reading the decision in *Cusumano* that the Court of Appeals for the Eighth Circuit agrees with the Court of Appeals for the Sixth Circuit that the existence of a tenure system is but one factor to consider in analyzing the due process claim of a formally non-tenured professor. In *Cusumano*, the Court of Appeals for the Eighth Circuit simply found that there were not enough factors to outweigh the existence of the formal tenure system and on which the Court could conclude that *Cusumano* had obtained a property interest in future and continued employment at The University of Missouri. To interpret the *Cusumano* decision as holding that the existence of a formal tenure system precludes the obtaining of de facto tenure is to broaden the scope of the opinion beyond its intended boundaries and to imagine words in the opinion that simply do not exist.

The cases of *Cusumano* and Respondent are totally different. There is no indication that Cusumano was an alien who was prevented by an unconstitutional statute from being a permanent employee. The only action taken by the University in *Cusumano* was the failure to give notice within the time specified by the University's regulation. Nowhere in the *Cusumano* decision are there the innumerable facts on which the District Court found in *Soni*, and the Court of Appeals affirmed, that:

> under *Roth* and *Perry*, there existed sufficient objective evidence to vest in plaintiff a cognizable property interest in the form of a reasonable expectation of future and continued employment. Defendant objectively acted toward plaintiff in such a manner as to reasonably lead

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> him to believe that he was a person with a relative degree of permanency in the academic community of this University. Upon acquiring this property interest, it cannot be terminated without procedural due process.
>
> . . . .
>
> It is the opinion of the Court that under the circumstances here, plaintiff had a viable understanding that his employment would continue on a permanent basis with the Department of Mathematics, notwithstanding the statement contained in the October 29 correspondence that plaintiff's position was one without tenure. All the evidence and testimony received by the Court points toward a mutual understanding of job permanency.
>
> While the issues of the constitutionality of the Tennessee statute restricting tenure to United States citizens is not before the Court, plaintiff could have reasonably concluded that "but for" the statute's presence he would have been granted tenure in 1968. Additionally, plaintiff was treated as a tenured faculty member and such objective manifestations served as a reasonable basis for a mutual understanding between plaintiff and the University. (A. 23-25).

After reviewing some of the many facts in the *Soni* case, the Court of Appeals for the Sixth Circuit emphatically affirmed the findings of the District Court:

> On the record before us, these findings cannot be held clearly erroneous, but to the contrary are supported by substantial evidence. Based on his findings, Judge Taylor correctly concluded that Dr. Soni's employment could not be terminated without notice and a hearing before an appropriate tribunal.

Respondent thus urges that any difference between the opinion of the Court of Appeals for the Eighth Circuit in

Cusumano and the opinion of the Court of Appeals for the Sixth Circuit in *Soni* does not come as a result of any conflict between the two circuits as to the effect the existence of a formal tenure system has in analyzing the due process claim of a formally non-tenured professor. Rather, the different results reached by the two courts in these two separate opinions are a result of the two entirely different sets of facts presented in each case. Respondent respectfully contends that both circuits agree with this Court in its holding in *Perry v. Sinderman*, *supra*, that the existence of a formal tenure system does not preclude the obtaining of de facto tenure.

The University's Formal Tenure System

The existence of a formal tenure system at The University of Tennessee by itself should not preclude a consideration of the facts of this case under a *Roth* and *Perry* analysis. The evidence indicates that though the University may have had a "formal tenure system" in 1967 and 1968, this system was really neither very formal nor consistently and uniformly applied. For Petitioners to claim that the mere existence of a formal tenure system precludes Respondent from showing that he had the equivalent of tenure is to discriminate unfairly against Respondent by allowing others who also lacked formal tenure status to go unchallenged.

In stipulating the testimony of Petitioners' witness, Dr. Harry T. Matthews, the following exchange took place between the District Court and counsel for the parties [Mr. Stair for Respondent and Mr. Leadbetter for Petitioners]:

MR. STAIR: We would elicit from Dr. Matthews that he did not receive his own tenure until after he was the head of the department.

THE COURT: He would testify to that?

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MR. STAIR: Yes.

MR. LEADBETTER: Well, we say he wouldn't testify—

MR. STAIR: It is your position.

THE COURT: Sir?

MR. LEADBETTER: We would indicate that—I believe that Dr. Matthews would testify that while he did not receive a letter stating that he had tenure until after this date, until after the date that he was made head, he received tenure prior to that time.

MR. STAIR: We would agree with Mr. Leadbetter entirely, that is the point. Dr. Matthews would testify that he considered himself tenured when he became an associate professor in 1967, and that he did not receive his official letter until after he was a full professor and he was head of the department, which was in either 1971 or 1972, and that was after the time he was made the head of the department on January 1, 1970.

MR. LEADBETTER: Your Honor, this is a lot of quibbling over letters. These letters—

THE COURT: I understand now what the situation is about, I understand it thoroughly, and so I think the stipulation is meaningful and I will so interpret it. (A. 105a-106a)

In addition, Dr. John Bradley, who came to The University of Tennessee in 1964 and is now a full professor, testified that he has never received any official notification of his tenure as required by the "formal tenure system" of the University. (A. 82a-83a). Furthermore, he testified that he considered the rank of associate professor as a position with tenure. (A. 83a). Even the Faculty Hand-

book stated that "Unless otherwise specified, persons with the title, rank, of Associate Professor or Professor hold these positions with tenure." (A. 83a).

These two instances thus indicate that, though the tenure system at the University may be very rigid and well defined today, as late as 1972 it was not very formal and neither uniformly applied nor regularly followed. In essence, the tenure system was observed more in the breach than in its actual application.

Equally important, these same two instances reveal the discriminatory manner in which Petitioners argue the University's tenure system should be applied. Petitioners are willing to concede that Dr. Matthews somehow obtained tenure prior to the receipt of a letter stating that he had tenure (A. 105a), but deny that Respondent could have obtained tenure in any other way than by first becoming a citizen and then receiving an official letter to that effect.

Petitioners' position is further undermined by the letter that was sent to Respondent's wife, Mrs. Soni. (Exhibit No. 7, A. 122a). The letter is dated the day after the letter to Respondent. It, too, is from the Acting Head of the Department of Mathematics, Donald J. Dessart. In fact, Dr. Dessart admitted in his testimony that it is the exact same letter he sent the day before to Respondent, except Mrs. Soni's letter did not have a reference to retirement benefits. (A. 100a-101a). In addition, the letter states that Mrs. Soni "be appointed an assistant professor without tenure . . . . The question of recommending tenure will be considered . . . at the time you become a citizen . . . ." (Exhibit No. 7, A. 122a). But Mrs. Soni could not have been considered for tenure even if she had been a citizen because, as Dr. Dessart admitted, she was only teaching part-time and part-time employees are not

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eligible for tenure or TIAA/CREF retirement benefits. (A. 101a). The letter was obviously in error, but Dr. Dessart never wrote Mrs. Soni correcting it even after the error was brought to his attention. (A. 101a).

This letter to Mrs. Soni thus indicates that the letters emanating from the Head of the Department of Mathematics office were considered nothing more than "form" letters by the Head of the Department himself, and it was never intended nor expected that anyone, including Respondent, much less the University, would seek to rely on them in arguing that Dr. and Mrs. Soni did not have implied tenure or a permanent position at the University. In effect, the uncorrected, error-filled letter to Mrs. Soni rather than being proof of the application of an exclusive and rigid formal tenure system only demonstrated and confirmed that the letters were merely matters of form rather than substance. Similarly, what was supposed to have been a formal tenure system as set down in the Faculty Handbook in application, as evidenced by the case of Dr. Bradley and Dr. Matthews, was neither adhered to very rigidly nor uniformly applied.

Based on these findings, the District Court correctly concluded "If this Court is to eschew formalistic and technical tests in finding property interest then the mere presence of a formal tenure system, as is the case under examination here, should not be a dispositive distinction between *Perry* and the case before this Court." (A. 25). Similarly, the Court of Appeals for the Sixth Circuit found that Petitioners' argument that the existence of a formal tenure system precluded Respondent from obtaining de facto tenure was not convincing. (A. 33).

The "Common Law" At The University

Respondent further contends that the existence of a formal tenure system at The University of Tennessee should not preclude him from obtaining de facto tenure since, as to him, there was no tenure system. Respondent was not a citizen and was therefore automatically excluded from ever obtaining official tenure status as long as he was an alien.

Respondent contends that the faculty of the Mathematics Department at the University sensed the injustice of such a situation and found a way to circumvent it while paying homage to its technical requirements. The University needed Respondent and wanted him to stay. They thought very highly of Respondent and knew that if he was not given some assurance of the permanency of his job status, he would not stay at the University. Accordingly, Respondent was granted de facto tenure while his de jure tenure was held in abeyance until he rid himself of his alien status. In essence, then, the state law and University regulation prohibiting the granting of permanent employment to non-citizens promoted and induced the formation of a "common law" to circumvent such an obviously unconstitutional and unfair statute.

The circumstances surrounding Respondent's employment at The University of Tennessee and the fact that he was not a citizen led to the evolution of "an unwritten 'common law'" at the University which was promulgated, nurtured, and supported by the University and its agents. The essence of this common law was that Respondent would be treated as and considered in all respects a tenured member of the faculty of the Department of Mathematics despite the fact that state law precluded the formal announcement of his tenure.

Evidence of this mutual understanding and "common law" is the fact that all of the witnesses, including Petitioners' witness, Donald J. Dessart, who attended the October 29, 1968, meeting, testified that they would have voted for granting tenure to Respondent if such a vote had been allowed. (A. 85a and 98a). In addition, Dr. Dessart's handwritten notes on the notice he sent out calling the meeting clearly indicate what he considered to be the attitude of the faculty: "If he were eligible for permanent appointment at this time, this group would recommend that he be given tenure." (Exhibit No. 5, A. 114a). In light of this evidence, the District Court and Court of Appeals found that Respondent could have reasonable concluded that " 'but for' the statute's presence he would have been granted tenure in 1968." (A. 25 and 33).

Such evidence thus verifies that there existed a need for a "common law" to supplement the technical rules of the University in order to insure that two associate professors of equal standing and ability in the Department of Mathematics were treated equally despite the fact that one was not a citizen. Respondent thus contends that from all of the circumstances and relevant facts there existed at the University a "common law" that entitled him to the equivalent of tenure despite the existence of a "formal" tenure system.

QUESTION 3

IF RESPONDENT WAS NOT PRECLUDED FROM OBTAINING DE FACTO TENURE FROM THE UNIVERSITY OF TENNESSEE IN A MANNER CONTRARY TO AND INCONSISTENT WITH THE PROVISIONS AND REQUIREMENTS OF THE UNIVERSITY'S FORMAL TENURE SYSTEM, DID RESPONDENT IN FACT OBTAIN SUCH DE FACTO TENURE?

Respondent contends that the District Court's finding of fact, which was affirmed by the Court of Appeals, is supported by substantial evidence. In fact, Respondent contends that the record is replete with evidence which, taken as a whole, presented a factual background against which the Court was forced to conclude that there vested in the plaintiff "a cognizable property interest in the form of a reasonable expectation of future and continued employment." (A. 23).

Initially, by virtue of the number of years Respondent taught as a full-time instructor and associate professor on the college level, Petitioners should be estopped to deny that Respondent is entitled to tenured status on the faculty. Respondent was employed at the University under five successive one-year contracts before being summarily notified of his termination by the letter dated March 8, 1972. Prior to joining The University of Tennessee, Respondent had spent one year as an associate professor at Oregon State University and six years teaching on the college level in India. It has been held that five successive one-year contracts are by themselves sufficient to create the required expectancy of re-employment that gives rise to implied tenure and a protectable property right requiring procedural due process. *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973); *Johnson v. Fraley*, 470 F.2d 179 (4th Cir. 1972); *Calloway v. Kirkland*, 334 F. Supp. 1034 (N.D.

Ga. 1971). By virtue of his length of service alone, Respondent acquired such a protectable property interest.

The evidence is uncontradicted as to the events leading up to the October 29, 1968, meeting. Shortly after Respondent joined the faculty at the University he began seeking a decision on the permanency of his job status from Dr. Barrett, who was then Head of the Department of Mathematics. (A. 44a-45a). During these discussions it was brought out that aliens could not be permanently employed at the University. But Respondent testified that the Head of the Mathematics Department had "said that notwithstanding the requirement we will make a decision and that the formality can be at your acquisition of citizenship, that the decision would be made but that the formality would be carried out as soon as you get your citizenship." (A. 57a).

Subsequently, Dr. Barrett, as the Head of the Department of Mathematics and knowing that state law prevented granting tenure to a non-citizen, recommended to the Professors and Associate Professors with tenure that Respondent be offered an Associate Professorship with tenure. (Exhibit No. 3, A. 110a). In his recommendation Dr. Barrett not only mentioned the understanding that Respondent would be considered for "a permanent position", but also recommended that "we express our intention to keep her (Mrs. Soni) on the staff permanently." (Exhibit No. 3, A. 112a). In the preceding sentence, Dr. Barrett had made it evident that he knew that Mrs. Soni was not eligible for an official permanent position since it was "not possible for two people in the same family to have tenure in the same Department." Nevertheless, his recommendation is evidence of the fact that he was as intent on insuring a permanent place on the staff for Mrs. Soni as he was for Dr. Soni, knowing all the while that neither could be granted formal tenure.

This same awareness of the law, coupled with a determination to get around it by the agents of Petitioners, is evidenced by the testimony and handwritten notes of Dr. Dessart, who became the Acting Head of the Department of Mathematics when Dr. Barrett became ill. In his notice calling the special meeting together on October 29, 1968, Dr. Dessart stated the purpose of the meeting to be to consider Dr. Soni "for a permanent appointment." (Exhibit No. 5, A. 114a). In testifying about the agenda items he wrote on one copy of the notice (Exhibit No. 5), Dr. Dessart stated:

> So we then considered the possibility of some kind of a promise of tenure, and the item that I indicated particularly in the—Item No. 4, was this attempt to set up some kind of a way that we might promise him tenure. (A. 89a).

Furthermore, in explaining the list of options he had written out, Dr. Dessart again testified that "These were possible options that I was considering at the time, to attempt some kind of a promise of tenure for Dr. Soni." (A. 90a).

The third item on Dr. Dessart's agenda states "Professor Soni desires some positive assurances, as he would either like to buy a home, look for a new job, make plans early." (Exhibit No. 5, A. 114a). Another list of Dr. Dessart's included these two items:

3. However, he does want some assurance

. . .

5. Other assurance - verbal from colleagues
- TIAA/CREF

These handwritten notes indicate an effort by the Acting Head of the Department to rationally list different ways to assure Respondent of his permanency without running

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afoul of state law. Petitioners argue that the verbal assurances Respondent received from his colleagues are not worthy of the Court's consideration as the type of evidence warranting a finding that the plaintiff obtained a reasonable expectation of future and continued employment. Yet the Head of the Mathematics Department thought them of such significance and such persuasive power as to list them as "other assurance" to be given to Respondent.

These actions and statements by Dr. Barrett and Dr. Dessart simply indicate an effort by the Department of Mathematics to circumvent the very law on which the University now seeks to rely. It was known to both Dr. Barrett, Dr. Dessart and the other faculty members that Respondent wanted some assurance of the permanency of his job status. They, in turn, wanted to give him those assurances because they wanted him to stay at the University. The University needed him and they thought highly of him. They knew that if he were not assured of a permanent position he would seek employment elsewhere at a time when associate professors in mathematics were in demand. Thus, they did everything in their power to promise and assure him of tenure while being careful not to formalize such a grant because of the state law. Their actions and statements are proof of Respondent's contention that the policies and practices of the University towards him rose to the level of granting implied tenure.

Respondent's contention is supported by other evidence. In response to Dr. Dessart's listed suggestions, Respondent was congratulated by his colleagues following the October 29, 1968, meeting. In addition, Dr. John Bradley testified that it was his impression following the meeting that Respondent "would be considered as filling a permanent position in the Department." (A. 86a). Thus, it is easily understood why the District Court, after weighing

the conflicting testimony, found that Dr. Dessart in effect assured Respondent of his permanency at the University when Dr. Soni confronted him over his October 29 letter recommending Associate Professorship "without tenure". (A. 25).

Similarly, Petitioners contend that the TIAA/CREF retirement benefits program is not an objective indicia of the plaintiff's permanency in the academic community. Yet, Petitioner's own Head of the Mathematics Department listed it as one other way to assure Respondent of his permanency. Furthermore, Dr. Dessart testified that he wanted to make these benefits retroactive as far back as possible so that they might have their maximum persuasive impact on Respondent. (A. 104a). The District Court and the Court of Appeals thus rightfully concluded that the award of the TIAA/CREF financial retirement program to Dr. Soni was indicative of his permanency at the University.

Further evidence of the practices and policies of Petitioners that lead the District Court and Court of Appeals to conclude that there vested in Respondent a cognizable property interest was the fact that a special meeting was called for the sole purpose of considering Respondent. The tenured faculty of the Mathematics Department could have waited two months and considered Respondent's case at their annual meeting along with the other faculty members eligible for promotion and tenure that year. Instead, however, they held a special meeting to consider Respondent's tenure even after it was known by the Acting Head of the Department of Mathematics that state law prohibited the formal granting of tenure to a non-citizen. Thus, by the time the annual meeting was held in January, 1969, the tenured faculty had already acted on Respondent and he was now one of the tenured faculty members who was in-

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vited, attended, and voted on the promotion and tenure of other members of the Mathematics Department. Objectively, in the space of two short months his status had been completely reversed. In October he was being considered for tenure; in January he was considering and voting on others' tenure.

In the years following the October 29, 1968, meeting, the lack of formal notice of tenure to other members of the Mathematics Department, including the Head of the Department, gave further assurance to Respondent that there was no reason for him to be alarmed by his own lack of formal tenure. Moreover, there was no reason for him to be overly concerned about the letter from Dr. Dessart. Dr. Dessart had explained it as a technicality and, after all, the same letter to Mrs. Soni had been totally in error. Since Respondent was treated just like any other tenured professor and since he attended the tenured faculty meetings and voted on the promotion and tenure of his colleagues, he, first, had no reason to think that the University would ever single him out of those who lacked formal tenure, and, second, try to terminate him, and, third, try to base that termination on a formality that they had repeatedly tried to circumvent as long as they needed and wanted Respondent to stay at the University.

Respondent contends that the many detailed facts in this case overwhelmingly compel the conclusion reached by the District Court and the Court of Appeals for the Sixth Circuit. Respondent did in fact obtain de facto tenure. The fact that a different result was reached in *Cusumano*, *supra*, does not indicate any split between the Eighth and Sixth Circuits regarding the holding and guidelines set forth in *Roth* and *Perry*. Rather, it simply points out the wide divergence and disparity in the facts between the two cases.

QUESTION 4

DOES THE PROVISION OF THE CHARTER OF THE UNIVERSITY OF TENNESSEE THAT THE UNIVERSITY MAY "SUE AND BE SUED" CONSTITUTE A WAIVER OF THE UNIVERSITY'S ELEVENTH AMENDMENT IMMUNITY, AS A STATE AGENCY, SUCH THAT THE PROPERTY OF THE UNIVERSITY IS SUBJECT TO DIVESTITURE THROUGH EXERCISE OF JUDICIAL POWER?

Respondent contends that the Eleventh Amendment does not bar the judgment awarded him against Petitioners in this case.

The District Court found that Respondent's termination by Petitioners had been without minimal due process and, therefore, wrongful. It thus ordered that Respondent receive all back pay from August 31, 1973, the date of Respondent's unlawful termination, until the completion of an appropriate due process hearing. (A. 26).

Petitioners argued in the Court of Appeals for the Sixth Circuit that this award violated the Eleventh Amendment and the decision of *Edelman v. Jordan*, 415 U.S. 651 (1974).

The Court of Appeals affirmed the District Court by holding that "the eleventh amendment does not bar the money judgment against the University in this case." (A. 38). The Court of Appeals based its decision on the fact that Tennessee had waived any immunity it might have had by consenting to suits against the University. (A. 38).

The Eleventh Amendment was ratified in 1798. In 1807 the Tennessee Legislature, in incorporating The University of Tennessee, adopted the following original charter provision:

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> The said trustees and their successors by the name aforesaid, may sue and be sued, plead and be impleaded, in any court of law or equity in this State or elsewhere. Acts of Tennessee, 1807, Chapter 64, Section 1 [Scott's Revision, Vol. 1, 1047 (1820)].

Tennessee's first Constitution of 1796 and the subsequent Constitutions of 1834 and 1870 provided that "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Constitution of the State of Tennessee, Article 1, §17.

The Court of Appeals thus held that the Legislature of Tennessee had consented that the trustees of the University (Petitioners) may sue and be sued and that, accordingly, Respondent was entitled to back pay from Petitioners.

In their Petition to Rehear, Petitioners argued that *Tennessee Code Annotated* §20-1702, adopted in 1873, reinstated the State's and, in turn, the University's immunity. Petitioners cited certain Tennessee decisions and a more recent opinion from the Office of the Attorney General in support of their contention. The Court of Appeals denied the Petition to Rehear.

Petitioners now make the same argument in claiming a conflict between the Tennessee Supreme Court and the Sixth Circuit.

Respondent respectfully contends that there is no such conflict and that the Tennessee Legislature has never rescinded the waiver of the Eleventh Amendment set forth in the Charter of the University.

The Tennessee decisions cited by the Petitioners dealing with the sovereign nature of property held by The University of Tennessee are inapplicable to the question of whether Respondent's judgment against Petitioners is barred

by the Eleventh Amendment. Those cases do not deal with or discuss the status of the trustees of the University under the Eleventh Amendment.

Further, the charter of the University permitting its trustees to sue and be sued has never been amended to delete such a provision, though the charter was amended as recently as 1971. Public Acts of 1971, Chapter 352. If the Tennessee Legislature does not want the trustees of The University of Tennessee to sue and be sued, its readily available remedy is to amend the University's charter.

It is thus the Respondent's position that *Tennessee Code Annotated* §20-1702 was not meant to and does not apply to Petitioners. If the Tennessee Legislature had intended to reinstate Eleventh Amendment immunity for the trustees of the University it would have done so by amending the act or charter which waived that immunity.

Respondent further contends that the judgment awarded him against Petitioners in effect amounts to the salary to which he is rightfully entitled, rather than a damage judgment or retroactive award as contemplated by *Edelman v. Jordan*, 414 U.S. 1301 (1974).

When the District Court and the Court of Appeals found that Respondent's termination was without minimal due process, said termination was rendered illegal, null and absolutely void. Accordingly, Respondent should be treated as being still employed by and a present member of the faculty of The University of Tennessee. As such he is entitled to his full salary from August 31, 1973, until the adverse completion of an appropriate due process hearing. *Zimmerer v. Spencer*, 485 F.2d 176 (5th Cir. 1973).

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Respondent also urges that the relief awarded by the District Court should be considered salary to which he is entitled as a present member of the faculty since the Court did not order Petitioners to hold a due process hearing, but left it to their discretion. (A. 26). The option given to Petitioners to not hold a due process hearing only makes sense if the Court's ruling is construed as intending to treat Respondent as a current member of the faculty. Otherwise, the University could choose to hold no due process hearing. The University would thereby avoid the risk of being unable to prove Respondent's termination was for a justifiable cause and yet not be faced with any obligation towards Respondent by way of a retroactive award or salary commitment. Under this interpretation, it would obviously be to the University's advantage to hold no due process hearing. In that event, Respondent would continue being without any income, the University would not have had to pay out any salary, and Respondent could not expect to ever receive a due process hearing. Thus, only if the Court's ruling is considered an award of salary to which the Respondent is justly entitled as a current member of the faculty does the granting of the option to the Petitioners to hold a due process hearing make sense. *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153 (8th Cir. 1973); *Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973).

Furthermore, if the District Court had categorically ordered that a due process hearing be held, but had awarded no back pay, the Court would have placed the burden of absorbing the costs of the delay in holding a due process hearing, which has been caused by Petitioners, on Respondent. Such a holding would not only have produced a grossly inequitable result, but it might also have given rise to a serious problem. If a due process hearing were held on

August 31, 1975, and Respondent succeeded in convincing an appropriate body that there were no grounds on which to terminate him, would Respondent be reinstated at that point and start receiving his salary from that date forward? Would that mean that Respondent would never be compensated for the two years he missed as a result of the University's denial of his constitutional rights? Would it be fair to require Respondent to absorb two years loss plus his litigation expenses to right a wrong perpetrated by Petitioners?

Respondent contends that these questions should be answered in the negative and that the only relief that makes sense and constitutes justice in this case is that awarded by the District Court and affirmed by the Sixth Circuit — Respondent is to receive his salary from August 31, 1973, until the University grants him a due process hearing.

Though Petitioners now argue that Respondent should not be entitled to back pay, they too recognize that in this type of situation it is only fair that a faculty member who is entitled to a due process hearing be awarded his salary during the pendency of such proceedings, or even in the event of suspension, until and unless he is adjudged guilty.

> The administration may for grave cause suspend an accused faculty member pending immediate investigation and speedy hearing, or, on recommendation of the faculty and administration committee, the administration may suspend a faculty member for cause. In any case of suspension ***the accused faculty member should suffer no loss of salary*** unless he is adjudged guilty and his appointment is terminated, in which event the committee, subject to the approval of this Board, will determine the date of termination. Faculty Handbook, The University of Tennessee, Knoxville, Approved

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by Board of Trustees, 1957 (Revised 1970), Chapter V, page 21. (Emphasis added).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
Supreme Court Building
Nashville, Tennessee 37219

OPINION NO. 28

TO: State Board of Regents
DATE: August 20, 1974

QUESTION

Concerning the constitutional validity of T. C. A. §49-1303. This statute bars aliens from permanent teaching positions in public colleges and schools, but permits temporary employment of aliens as teachers in the college and university levels. If valid, it prohibits an alien from achieving tenure.

OPINION AND ANALYSIS

On June 25, 1973, the United States Supreme Court, by a margin of 8-1, struck down a New York statute which provided that only citizens of the United States could hold permanent positions in the competitive class of the state Civil Service. *Sugarman v. Dougall*, 93 S.Ct. 2342 (1973). This opinion did not go so far as to hold that a State could not lawfully establish a citizenship requirement where there is a legitimate state interest to be furthered thereby. But insofar as T.C.A. §49-1303 relates to employment in Higher Education, it prohibits only the achievement of tenure by non-citizens. Under this statute aliens can hold

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and have held teaching positions for several years in Tennessee's Public Institutions of Higher Education. We are unable to see how T.C.A. §49-1303 furthers any legitimate state interest as that term is defined by the *Sugarman* case.

It is the opinion of this office that, insofar as it relates to employees in public higher education, T.C.A. §49-1303 is unconstitutional.

W. HENRY HAILE
Assistant Attorney General

APPENDIX B

THE KNOXVILLE NEWS-SENTINEL

June 19, 1975

Page 2, Column 3

9 NON-CITIZENS GIVEN UT TENURE

Nine UT professors who are not U.S. citizens have been given tenure by the University, the first time this has happened.

"All of these are in the U.S. on permanent resident visas and it expected all will be granted citizenship," Dr. John Prados, vice president of academic affairs today told the Board of Trustees.

The non-citizens were part of 156 professors granted tenure today by the board. The decision came from a ruling by the state attorney general that present Tennessee law may be unconstitutional. He based his ruling on a recent U.S. Supreme Court decision that struck down a similar New York law prohibiting tenure for non-citizens.

The Board of Regents, the regulatory body for the six state and 10 community colleges besides UT, has already granted tenure to non-citizen professors in other Tennessee universities.